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No. 90-769

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

LOUISE H. RENNE, City Attorney for the
CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,

vs.

BOB GEARY, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND
BRIEF AMICUS CURIAE OF THE CALIFORNIA JUDGES ASSOCIATION IN SUPPORT OF PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.4, the California Judges Association ("CJA") seeks leave to file a brief amicus curiae in support of Petitioners. Counsel for Petitioners has given consent. Counsel for all Respondents except Terence Faulkner and Sudi Trippet has similarly consented. Letters seeking consent have been sent to Mr. Faulkner and Ms. Trippet, who both appeared *pro se* in this proceeding. Neither letter has been returned.

The CJA has a direct interest in this case. Its members include virtually every active and retired judge from the California Supreme Court, the California Courts of Appeal, and the State's Superior, Municipal and Justice Courts. If this litigation results in the invalidation of Article II, Section 6(b) of the California Constitution, each

member of CJA facing an election or retention campaign will obviously be affected. Moreover, the CJA and its members are concerned that permitting political parties to endorse candidates, make contributions, and otherwise participate in judicial elections will adversely affect the public's perception of California's judges as impartial and nonpartisan, a perception that CJA believes is essential for the California courts effectively and impartially to administer justice.

The brief amicus curiae which CJA seeks leave to file focuses on the special constitutional concerns applicable to campaigns for judicial office. In particular, the accompanying brief seeks to justify Article II, Section 6(b) as a means to further the State's compelling interest in promoting the appearance of justice, an interest mentioned only in passing in the petition for certiorari. The CJA thus believes that the accompanying brief may be helpful to the Court and, accordingly, requests leave to file.

DATED: February 28, 1991.

Respectfully,

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BRIEF AMICUS CURIAE OF THE CALIFORNIA JUDGES ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Amicus curiae California Judges Association is the collective voice of the California state judiciary, the Nation's largest judicial system. It speaks for a membership comprising virtually every active and retired judge from the State's Supreme Court, Courts of Appeal, and Superior, Municipal and Justice Courts.

This case concerns the constitutionality of Article II, Section 6(b) of the California Constitution, which provides that "[n]o political party or party central committee may endorse, support, or oppose a candidate for nonpartisan office." Article II, Section 6(a) in turn makes "[a]ll judicial, school, county and city offices" nonpartisan.

Doubtless because these constitutional provisions affect campaigns for both judicial and non-judicial offices, neither the petition for certiorari nor the principal opinion below differentiates between judicial elections and elections for other nonpartisan positions. Indeed, even the two Ninth Circuit opinions that discuss whether invalidating Section 6(b) would threaten the independence of the judiciary seem more concerned with the pragmatic effects of the decision below than with whether analysis of Section 6(b)'s constitutionality might be different for judges than for other non-partisan officials.

Amicus believes that this difference is crucial for resolving the important First Amendment issue this case presents. Indeed, no analysis that treats judges fungibly with other local officials does justice to the interests at stake. For example, the Ninth Circuit discounted California's interest in maintaining "elected officials' independence from partisan political pressures" because it believed democracy is vindicated when "candidates and elected officials alter or reaffirm their own positions on issues in response to political messages . . . ." App. to Pet. A4-A5 (citation omitted). That may well be true for

local officials such as members of a county board of supervisors, school board, or city council. But for judges to "alter . . . their own positions on issues in response to political messages" is to violate their oaths of office.

Unlike municipal officials, or a members of a county board of supervisors or community college district, judges have the power permanently to deprive citizens of their life, liberty and property. Consequently, judges must both be fair—and appear to be so. As a result, the State has an interest in regulating judicial elections so as to preserve judicial independence that may be largely absent with respect to elections for less sensitive offices.

Amicus believes that Section 6(b) furthers the actuality and the appearance of justice by freeing California's judges from the stigma of partisanship. Indeed, Section 6(b) is a vital part of California's non-partisan judicial election system. That system has served California well. Although the California judiciary is larger than either the federal judiciary or that of any other State, the California courts have been notably free of corruption, scandal, or the misuse of judicial power for partisan ends. As the collective representative of the members of that judiciary, amicus believes that invalidation of Section 6(b) would threaten both the actuality and the appearance of justice, and therefore urges the Court to grant certiorari.

ARGUMENT

I.

CALIFORNIA HAS A COMPELLING INTEREST IN PROMOTING PUBLIC CONFIDENCE IN THE IMPARTIALITY OF ITS JUDICIARY.

The petition for certiorari identifies two compelling interests served by Section 6(b): promoting impartial administration by local officials and judges and freeing those who hold nonpartisan positions from partisan pressure. Pet. 8-10. This brief focuses on a related, but distinct, interest: preserving the *appearance* of impartial justice.

This Court has often recognized that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The Court has invoked this interest in a variety of contexts: to reverse state court judgments where the judge had a personal stake in the outcome (*Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986)); to hold under this Court's supervisory power that a party benefitting from a federal court order may not be appointed to prosecute a contempt action for a violation of that order (*Young v. U.S. ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987)); to grant the public and press a First Amendment right to attend criminal trials (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980)); and to hold that claims of discrimination in the selection of grand jury veniremen are cognizable on federal habeas corpus. *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979). Indeed, the notion that justice must both be fair and appear to be so is "deeply rooted in the common law," as well as in this Court's constitutional jurisprudence. *See Levine v. United States*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

The State's interest in preserving the appearance of justice is separate and distinct from, although obviously related to, the interest that justice in fact be done in any particular case. For this reason, the need to satisfy the appearance of justice "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. at 825 (quoting *In re Murchison*, 349 U.S. at 136). Indeed, this Court has held that the need "to promote public confidence in the integrity of the judicial process" justifies the disqualification of judges under 28 U.S.C. §455(a), which requires that a judge disqualify himself "in any proceeding in which his impartiality might reasonably be questioned," even if the judge has no knowledge of the facts creating an appearance of impropriety. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 859-60.

The distinction between the actuality of justice and its appearance has important ramifications for this case. The two Ninth Circuit opinions that specifically address Section 6(b)'s applicability to judicial elections differ as to whether invalidating that provision will threaten the *actuality* of justice by throttling judicial independence. *Compare* App. to Pet. A16-A20 (Reinhardt, J., & Kozinski, J., concurring) (Section 6(b)) "appears to be a particularly peculiar way of addressing the problem of maintaining judicial independence") *with id.* at A55-A66 (Alarcon, J. dissenting) (Section 6(b)) is the "only realistic safeguard of judicial independence"). In our view, however, the constitutionality of Section 6(b) should not turn on whether San Francisco has amassed sufficient proof that judges endorsed by political parties will in fact trim their decisions to the dictates of partisan politics. Instead, this Court should consider whether Section 6(b) serves the State's separate interest in preserving the appearance of justice.

As we shall now demonstrate, the California electorate believes that judges endorsed and supported by political parties cannot be truly independent. Moreover, this belief is solidly grounded in both historical experience and analysis of the prerequisites for an independent judiciary. Accordingly, Section 6(b) serves the State's compelling interest in promoting public confidence in the impartiality of its judges.

II.

SECTION 6(b) SERVES THE STATE'S COMPELLING INTEREST IN PROMOTING PUBLIC CONFIDENCE IN THE IMPARTIALITY OF ITS JUDICIARY BY PREVENTING CALIFORNIA'S JUDGES FROM BEING PERCEIVED AS PARTISAN.

California's nonpartisan judicial election system did not emerge from a vacuum. To the contrary, as the petition for certiorari and Judge Alarcon's dissent demonstrate, nonpartisanship was a direct response to pervasive partisan corruption of politics at the state and local level. Pet. 7-8; App. to Pet. A48-A50 (Alarcon, J., dissenting). Thus, in

1913, after numerous scandals led to the election of Governor Hiram Johnson on a platform of political reform, California enacted a statute barring political parties from nominating candidates for judicial office. Cal. Stats. 1913, ch. 690, §5. In 1926, the first reference to non-partisanship with respect to judicial elections was added to the California Constitution (Cal. Const., art. II, §2-3/4 (1926)), and in 1972 the California Constitution was amended explicitly to state that "[a]ll judicial, school, county, and city offices shall be non-partisan."

In 1984, the California Supreme Court held in *Unger v. Superior Court*, 37 Cal. 3d 612 (1984), that this language did not prohibit partisan endorsements in non-partisan races. At the very next general election the voters adopted Proposition 49, which added Article II, Section 6(b) to the California Constitution. As the petition for certiorari notes, the ballot argument in favor of Proposition 49 argued that an endorsement ban was necessary to prevent political party machines from controlling judges, school boards and local officials. Pet. 5; *see also* App. to Pet. A43 n.35 (Rymer, J., dissenting). However, the proponents of the measure placed equal importance on the need to preserve the *appearance* of justice, particularly with respect to judicial elections. Thus, the ballot argument in support of Proposition 49 stated:

> "WHEN PARTY BOSSES HAVE HAD A STRANGLEHOLD ON LOCAL POLITICS ELSEWHERE, HOWEVER, CORRUPTION IN CITY HALL AND IN THE COURTS OFTEN HAS BEEN THE RULE . . . NOT THE EXCEPTION.
>
> "To assure that our courts will not be manipulated by political bosses, your yes vote on Proposition 49 is absolutely necessary.
>
> "WHO WOULD TRUST THE FAIRNESS OF TRIALS TO JUDGES WHO WERE CHOSEN—NOT BECAUSE THEY ARE IMPARTIAL—BUT BECAUSE THEY OWE

ALLEGIANCE TO THE POLITICAL PARTIES WHICH GOT THEM ELECTED?" (California Ballot Pamphlet, June 3, 1986 Primary Election, at 26)

The opponents of Section 6(b) did not quarrel with the need to promote judicial independence, or to remove judges from the partisan arena. Instead, they contended, in the rebuttal to the argument quoted above, that Proposition 49 was overbroad, because it dealt with city, county and school board officers, as well as judges:

> "Proposition 49 is far too broad just to deal with partisan involvement in judicial elections. It prohibits party recommendations in all city and county elections. There should be a much narrower ballot measure for judicial elections." (*Id.* (emphasis added))

In adopting Proposition 49 by a substantial (56%-44%) margin, California voters accepted the contention that permitting partisan involvement in judicial elections would threaten the impartiality of the judiciary.[1] That belief in and of itself provides a constitutionally sufficient reason to hold that Section 6(b) serves a compelling interest. If the California electorate believes—as the passage of Proposition 49 indicates—that partisan involvement in judicial elections threatens the impartiality of the State's judges, permitting such involvement will inevitably lessen public respect for the courts and thus threaten the appearance of justice.[2]

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[1]Although this Court does not seem to have addressed the issue, "California decisions have long recognized the propriety of resorting to . . . election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people." *White v. Davis*, 13 Cal. 3d 757, 775, n.11 (1975); *Carter v. Commission on Qualifications of Judicial Appointments*, 14 Cal. 2d 179, 185 (1939).

[2]Because justice must both be fair and appear to be so, this argument does not turn on whether increasing partisanship in the judicial selection (continued...)

We use the term "partisan involvement" advisedly. Although the Ninth Circuit's majority opinion states at one point that Section 6(b) "imposes a total ban on any gesture of support for or opposition to a candidate" (App. to Pet. A8), both that opinion and the concurrence repeatedly describe Section 6(b) as a "ban on partisan endorsements" and analyze its constitutionality accordingly. *See, e.g.*, App. to Pet. A10 ("the ban on partisan endorsements by political parties burdens political speech without being narrowly tailored to serve competing state interests"); *id.* at A21 ("the prohibition of endorsements appears to be counter-productive"). In fact, however, Section 6(b) is *not* limited to endorsements; instead, it provides that no political party or central committee shall "endorse, *support, or oppose* a candidate for non-partisan office." (Emphasis added). The ballot argument in favor of Proposition 49 reveals that

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[2](...continued)
process will in fact lead to more partisan judicial decision-making. However, academic literature not cited by the Ninth Circuit indicates that this will occur. Thus, one leading scholar of judicial elections—(whose work was cited by the concurrence (*see* App. to Pet. A20 n.9)—has written:

> "[P]artisanship of the judicial selection system . . . has an impact upon judicial behavior. A partisan judicial selection system is more likely than a nonpartisan system both to [a] encourage the recruitment of party activists deeply committed to the policy and value orientations of their party and [b] provide judges with a partisan constituency whose policy preferences the judges must anticipate in their judicial decision-making if they are to realize renomination and re-election." (P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 162 (1980))

Even in the absence of definitive evidence on this issue, the California electorate was free to act on the basis of beliefs that are not "clearly wrong." *Gregg v. Georgia*, 428 U.S. 153, 184-87 (1976) (plurality opinion) (inconclusive debate as to whether capital punishment is a deterrent does not prevent legislature from determining that capital punishment is necessary in some cases); *accord Paris Adult Theater I v. Slaton*, 413 U.S. 49, 60-63 (1973) (legislature may assume without scientific data that exposure to obscene material adversely effects individuals and society). Indeed, this Court has recognized that a legislative determination that a particular category of speech threatens the administration of justice "would weigh heavily in any challenge of the law as infringing constitutional limitations." *Bridges v. California*, 314 U.S. 252, 260 (1941); *accord Wood v. Georgia*, 370 U.S. 375, 385-86 (1962).

Section 6(b) was intended to prevent political parties from providing "money, help, and endorsements" in non-partisan races. California Ballot Pamphlet, June 3, 1986 Primary Election, at 26.[3] Thus, the issue before this Court is not whether California's voters were legitimately concerned that judicial independence might be compromised by partisan endorsements alone, but rather whether they reasonably perceived that partisan endorsements, organizational support, *and* monetary contributions would threaten public confidence in the impartiality of California's courts.[4]

The California electorate's belief that partisan involvement in judicial elections threatens judicial independence is eminently reasonable, and is based on both long-established tradition and historical fact. Immediately prior to the Progressive era, Lord Bryce argued that popular elections for judges "lower[ed] the character of the judiciary," due to the influence of political parties. 1 *American Commonwealth* 507 (3d ed. 1905).[5] Congress, too, has recognized that partisan political activities pose a particular threat to the impartial administration of the law; thus, the Hatch Act bars federal employees from engaging in partisan—but *not* non-partisan—political activities. *Compare* 5 U.S.C. §7324(a)(2) *with* 5 U.S.C. §7326; *see also*

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[3]Thus, the ballot argument told the electorate that local office holders were "concerned that the more they have to rely on money, help, and endorsements from political machines, the more they will owe the political machines." *Id.*

[4]Although this case arises from the refusal of San Francisco's Registrar of Voters to permit official party endorsements to be printed in the Voter's Pamphlet (*see* App. to Pet. A2), the District Court's judgment restrains enforcement of Section 6(b) in toto, rather than simply as applied to endorsements (App. to Pet. A118), and that judgment was affirmed by the Ninth Circuit. App. to Pet. A10. Because this Court reviews judgments, not opinions (*Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)), it is of no moment that the Ninth Circuit's opinion focuses almost exclusively on Section 6(b)'s effect on endorsements.

[5]"Popular elections throw the choice into the hands of political parties, that is to say, of knots of wirepullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance." (*Id.*)

Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548, 576 (1973).

Experience in other states has confirmed California's wisdom in seeking to keep political parties out of the judicial election process.[6] For example, following the "Greylord" scandal in Chicago, Illinois, the chief judge of the Circuit Court of Cook County created a Special Commission on the Administration of Justice in Cook County. The Commission's report includes a telling description of the evils of partisan judicial elections:

> "Where a position on the bench has been secured with the political, organizational, or financial assistance of party leaders, the judge 'enters upon his office under a load of political debt, and however high-minded he may be, he will find it almost impossible to resist completely the importunities of his creditors for payment through judicial favors—sometimes slight, sometimes not so slight.'" Special Commission on the Administration of Justice in Cook County, *A Report on Judicial Selection*, 4 (1985))[7]

Cook County's experience is typical. In 1988, a report of the New York State Commission on Government Integrity reached similar conclusions after a study of judicial elections in that State. In concluding that "the conflict between party politics . . . and judicial independence and non-partisanship . . . is inherent in the partisan nature of party activity and political elections," the Commission stated:

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[6]The concurrence criticizes San Francisco for failing to proffer evidence concerning the effects of partisan endorsements in California. App. to Pet. A-15 n.5. But California did not have to look only to its own experience in deciding to adopt Section 6(b). *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51 (1986) (city could rely on experience of other cities in adopting adult theater zoning ordinance).

[7]A copy of this Report was lodged with the Clerk concurrently with the brief amicus filed in support of the petition for certiorari.

"While party control may be appropriate in the case of election to offices within the legislative or executive branches, in the case of judicial elections, such control undermines the moral foundation of the judiciary by threatening its independence and non-partisanship." (State of New York Commission on Government Integrity, *Becoming a Judge: Report on the Failings of Judicial Elections in New York State*, 4 (1988))

• • • •

"As our investigation shows, political parties are geared to reward loyalty, not merit; to discourage, not encourage independence and diversity; and to obtain power rather than promote justice. Such goals, however valuable to the operation of the party system in general, have no place in the selection of our judges." (*Id.* at 44-45)[8]

The belief of California's voters that partisanship and judicial independence are mutually incompatible is supported by logic, as well as experience. As Justice Scalia recently stated, "partisanship [in a judge] is not only unneeded but positively undesirable." *Rutan v. Republican Party of Illinois*, -- U.S. --, 58 U.S.L.W. 4872 (1990) (Scalia, J., with Rehnquist, C.J., & Kennedy, J., dissenting). That is so for two separate, but related, reasons. First, judges may not be partisans because they must decide cases on their merits, and not on the basis of extraneous considerations based on political benefit or personal policy preferences. *See Chevron v. Natural Resources Defense Council*, 467 U.S. at 866. Second, because members of the "political" branches of government—unlike judges—*can* make decisions based on partisan considerations (*id.*),

[8]A copy of this Report was lodged with the Clerk concurrently with the brief amicus filed in support of the petition for certiorari.

judicial partisanship lessens the distinction between the Judiciary and the Legislative and Executive branches of Government, and thus impairs the Judiciary's legitimacy. *Cf. Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (Because this Court possesses "neither the purse nor the sword," its authority "ultimately rests on sustained public confidence in its moral sanction," confidence that "must be nourished by . . . complete detachment, in fact and in appearance, from political entanglements . . . ."). For this reason, as the Court recently stated, "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality *and* nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (emphasis added).

California's voters thus had good reason to believe that the legitimacy of the State's judiciary—and its "reputation for impartiality and nonpartisanship"—would be weakened by permitting partisan "money, help, and endorsements" in judicial elections. Even in the unlikely event that no judge ever takes account of "political debt" in deciding a case, partisanship inevitably compromises the appearance of justice because it impairs the independence of the judiciary from the "political" branches. Freedom from partisanship—from "political entanglements"—is what separates the Judicial Branch from the rest of government. Once California's judges are labelled as partisan, nonpartisan judicial races will be distinguishable in name only from elections for Governor and members of the Legislature. But because judicial independence is founded upon nonpartisanship, judges identified in the consciousness of the electorate as "Democratic" or "Republican" will inevitably appear less independent of the "political" branches, less "legitimate," and less fair.[9]

[9]One need not be a Cassandra to believe that permitting partisan support in judicial elections will inevitably lead to judges and courts being tarred with partisan labels. In 1982, for example, one television commercial in Ohio told the voters that the "Democratic Supreme Court" had saved the electorate $30 million in just one year "by saying no to utility rate hikes," and urged voters to "keep the people's court

(continued...)

Section 6(b) thus serves California's compelling interest in promoting public confidence in the impartiality and nonpartisanship of its judiciary. We turn now to examine whether the provision is "narrowly tailored" to serve that interest.

III.

SECTION 6(b) IS NARROWLY TAILORED TO SERVE THE STATE'S COMPELLING INTEREST IN PROMOTING PUBLIC CONFIDENCE IN THE IMPARTIALITY OF ITS JUDICIARY.

In holding that Section 6(b) is not "narrowly tailored" to serve the interests identified by San Francisco, the Ninth Circuit's majority opinion and the concurrence criticized the provision on several grounds. First, the concurrence found that Section 6(b) did not serve the State's interest in "maintaining judicial independence" because "the dependence of judges on campaign contributions represents a far greater threat to the integrity of California's judiciary than the possibility that some judicial candidates may be endorsed by political party organizations." App. to Pet. A20. Second, the concurrence held that California may not constitutionally distinguish between political parties and other entities wishing to support or oppose candidates for judicial election. App. to Pet. A22. Third, the majority opinion upheld the District Court's finding that the "State could adequately safeguard the interests §6(b) was designed to protect by less drastic means, including provision for non-partisan methods of nominating candidates for local and judicial offices and controls on partisan activities of the candidates." App. to Pet. A8. As we shall now show, the first of these criticisms ignores recent changes in California law, as well as the critical differences between campaign contributions and

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[9](...continued)
Democratic." Schotland, *Elective Judges' Campaign Financing*, 2 J. L. & POL. 57, 66 (1985). Obviously, Republicans and others championing causes favored by the G.O.P. may have reason to doubt whether a court elected as a "Democratic Supreme Court" will treat them impartially.

partisan endorsements, while the latter two fail to account for the State's interest in promoting public confidence in an impartial and nonpartisan judiciary.

A. The Ninth Circuit's Opinions Ignore Recently Enacted Limits On Contributions To Judicial Candidates In California As Well As The Substantial Differences Between Partisan Political Activity And Campaign Contributions.

The concurrence errs in assuming that the California electorate is insensible to the threat posed to judicial independence "from massive political contributions." App. to Pet. A11. While the opinion focuses almost exclusively on the California Supreme Court judicial retention election of 1986 (App. to Pet. A18-A20), California law has changed significantly since that episode. In 1988, California's voters adopted Proposition 73, which imposes strict contribution limits. "Persons" are subject to an annual contribution limit per candidate of $1,000. Cal. Gov't Code §85301(a).[10] Political committee contributions are subject to a per candidate annual limit of $2,500. Cal. Gov't Code §85303(a).[11] A "broad-based political committee" is limited to annual contributions of up to $5,000 per candidate.[12] These limits apply to candidates for "elective office" (Cal. Gov't Code §§85301(a), 85303(a)), which includes judicial offices. Cal. Gov't Code §82023.[13] Thus,

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[10]A "person" is defined to mean "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and labor organization." Cal. Gov't Code §85102(b).

[11]A "political committee" is defined as "a committee of persons who receive contributions from two or more persons and acting in concert makes contributions to candidates." Cal. Gov't Code §85102(c).

[12]A "broad-based political committee" is defined to mean "a committee of persons which has been in existence for more than six months, receives contributions from 100 or more persons, and acting in concert makes contributions to five or more candidates." Cal. Gov't Code §85102(d).

[13]A federal district court has recently restrained enforcement of (continued...)

even assuming *arguendo* that interest group contributions pose a greater threat to judicial independence than does partisan political activity, the concurrence is wrong to suggest that the California electorate has "address[ed] only the superficial evil [of partisan involvement in nonpartisan campaigns] and fail[ed] to consider the underlying problem [of campaign contributions]." App. to Pet. A12.[14]

Moreover, the concurrence fails to acknowledge that campaign contributions pose a qualitatively different and less severe threat to the appearance of justice than partisan electioneering. Not every campaign contribution threatens judicial impartiality, and the large contributions that do pose a problem can be eliminated, as California has sought to do.[15] Nor, of course, will every case—or even many cases—heard by a particular judge involve campaign contributors. And in the rare case where a contribution might reasonably cause an objective observer to question the impartiality of the judge, judicial recusal is an available—and, in some cases, perhaps a required—

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[13](...continued)
Proposition 73's contribution limits, on the ground that imposing limits on an annual (fiscal year) basis is unfair to challengers. *Service Employees International Union v. Fair Political Practices Commission*, 747 F. Supp. 580, 588-90 (E.D. Cal. 1990), *application for stay of enforcement pending appeal denied sub nom. Kopp v. Service Employees International Union*, – U.S. –, 59 U.S.L.W. 3307 (Oct. 12, 1990). However, that decision may be reversed on appeal. Moreover, since contribution limits *per se* are unquestionably constitutional (*Buckley v. Valeo*, 424 U.S. 1 (1976)), there is no reason to believe that California's voters would not replace the contribution limits found in Proposition 73 with constitutional ones, if necessary.

[14]The concurrence also errs in comparing campaign contributions to partisan endorsements. *See, e.g.*, App. to Pet. A20. As discussed above, Section 6(b) proscribes not only partisan endorsements, but contributions and other forms of tangible aid, as well.

[15]Cf. Note, *Disqualifying Elected Judges From Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 489 (1988) (arguing that a rule limiting attorney contributions under penalty of recusal by the judge "will reduce these contributions to a fairly uniform size, so that no single contributor will stand apart from the rest as having been *the* major cause of the judge's accession to the bench. As a result, there is no individual to whom the judge owes a debt of gratitude sufficient to cause an objective appearance of bias") (emphasis in original).

remedy.[16] For these reasons, the ethical problems posed by campaign contributions in judicial elections are episodic, rather than systemic, and thus do not pose a clear and present danger to the public's confidence in judicial independence and nonpartisanship. Cf. *Mistretta v. United States*, 488 U.S. at 407 (while "problem of individual bias is usually cured by recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judicial entanglement in the making of policy").[17]

B. Section 6(b) Is Not Underinclusive Because It Addresses Only Political Parties, And Not Other Interest Groups That Participate In Judicial Campaigns.

The concurrence's conclusion that California may not permissibly differentiate between political parties and other groups that participate in judicial elections ignores the State's appearance in promoting judicial independence and nonpartisanship. As long as contributions are limited,

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[16]The ABA Code of Judicial Conduct, adopted in 1972, required judges to disqualify themselves in any proceeding where "their impartiality might reasonably be questioned . . . ." The new ABA Model Code of Judicial Conduct, adopted in 1990, contains identical language. §3E(1). Moreover, California law provides an additional safeguard against a judge deemed biased by an attorney or a litigant, since California permits either a litigant or a party to exercise one peremptory challenge in any case against any judge as of right, without any showing of cause other than the filing of a declaration stating that in the declarant's opinion, the judge is biased. Code Civ. Proc. §170.6.

[17]Indeed, the electorate's differing treatment of campaign contributions and partisan political activity in the context of judicial elections in and of itself demonstrates that the latter, but not the former, threatens the appearance of justice. While the electorate has attempted to ban partisan "money, help, and endorsements" by enacting Section 6(b), campaign contributions have been limited, rather than eliminated. The electorate has also adopted an election system which bans public financing (Cal. Gov't Code §85300), and thus requires candidates to seek private sources of funding for their campaigns. Plainly, the electorate does not agree with the concurrence that campaign contributions per se pose a greater threat to impartial and nonpartisan justice than partisan political activity. Because the State's interest in promoting the appearance of justice is based on the need to preserve public confidence in the impartiality of its courts (*see Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. at 864-65), it is the electorate's opinion, rather than that of the concurrence, that should be dispositive.

and judges disqualify themselves in appropriate cases involving campaign contributors or opponents, political activity in judicial elections by special interest groups and newspapers (such as those mentioned in the concurring opinion at A22) do not threaten judicial independence. When contributions or endorsements come from political parties, however, a new and different factor enters the equation. As we have seen, the independence of the judiciary is not limited to the idea that judges must decide cases on their merits, free from extraneous "political" considerations. Instead, it is also based on maintaining the distinction between the Judiciary and the other, "political" branches of government. *See* pp.10-11, *supra*.

Partisan involvement in judicial elections thus threatens judicial independence in a way that non-partisan activity does not. Partisan activity in judicial elections links the judiciary to political partisans in the legislative and the executive branches. But no such linkage occurs as the result of involvement in judicial elections by other interest groups.[18]

Here, too, logic is confirmed by experience. As Judge Alarcon's dissent below demonstrates, California's nonpartisan judicial election system came into existence as a response to entrenched partisan corruption. *See* pp.4-5, *supra*. There is no corresponding history of corruption instigated by pressure groups such as those identified in the concurring opinion. In the absence of such a history, California need not apply rules intended to disassociate political parties from their Tammany Hall heritage to interest groups such as the National Organization for

[18]This linkage has a direct impact on judicial independence. Much of what courts do involves passing on the activities of the other branches of government. Thus, when a court rules upon the constitutionality of a statute, or reviews an administrative decision, or decides a criminal case brought by a district attorney, it necessarily reviews the legality of decisions made either by elected officials or those subordinate to and carrying out the policies of such officials. If, however, judges are subject to the same partisan forces as other elected officials, the electorate may perceive that such review will not be truly independent.

Women, the National Right to Life Committee, or the Sierra Club.

C. There Are No Less Drastic Alternatives To Section 6(b) That Would Serve As Effectively The State's Interest In Promoting Public Confidence In The Impartiality And Nonpartisanship Of Its Judiciary.

In holding that Section 6(b) was not "narrowly tailored," the Ninth Circuit's majority opinion held that the State's interest in promoting impartial administration and freeing nonpartisan office holders from partisan pressures could be achieved by the State's nonpartisan election statutes without banning partisan political activity. App. to Pet. A8 & n.4. If the State's interest is defined as promoting the appearance of justice, however, these statutes became irrelevant.

We have seen above that California has a strong interest in preventing its judges from being identified as political partisans. *See* Part II, *supra*. Prohibiting partisan "money, help, and endorsements" furthers that interest precisely. Even if the mechanics of nomination and voting remain formally nonpartisan, judicial candidates who are identified in billboards, bumper strips, newspaper advertisements, and television and radio commercials as candidates of a political party will inevitably be seen as partisan judges. Consequently, contrary to the Ninth Circuit's opinion, formal nonpartisanship is not enough. Section 6(b) is therefore "narrowly tailored" to further the State's interest in promoting judicial independence and nonpartisanship.[19]

[19]In holding that Section 6(b) was not "narrowly tailored," the Ninth Circuit's majority opinion relied heavily on the "fact" that California managed to have nonpartisan government for seventy years "without benefit of a formal ban on partisan advocacy . . . ." App. to Pet. A8 & n.4. During all but the last two years of that period, however, it was unclear whether California law in fact prohibited partisan involvement in nonpartisan elections. *Compare Unger v. Superior Court*, 102 Cal. App. 3d 681 (1980), *cert. denied*,, 449 U.S. 1131 (1981) (holding that California law prohibited such involvement) *with Unger v. Superior Court*, 37 Cal. 3d 612 (1984) (holding to the contrary). Indeed, the majority opinion

(continued...)

CONCLUSION

The Ninth Circuit's judgment should be reversed, and Section 6(b) upheld as constitutional.

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Respectfully,

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[19](...continued)
itself admits that "because the legal status of [partisan] endorsements was unclear, political parties did not endorse candidates in 75% of California counties." App. to Pet. A1. Moreover, there is no evidence that political parties and party central committees were extensively involved in nonpartisan judicial elections during this period. *See* App. to Pet. A36 n.20 (concluding that the 1960 study relied on by the concurring opinion was unclear as to the extent of partisan involvement in judicial races). At most, the evidence suggests that three county central committees endorsed judges in the years prior to the first *Unger* decision. *See Unger v. Superior Court*, 102 Cal. App. 3d at 684-85 n.4.